No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CLASS RESPONDENTS IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether approval of this class-action settlement providing the class with *cy pres* relief directly and substantially relating to the complained-of harm as "fair, reasonable, and adequate" was an abuse of the district court's discretion.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court of appeals, are Theodore H. Frank and Melissa Ann Holyoak.

Respondents, who were appellees in the court of appeals, are Paloma Gaos, Anthony Italiano, and Gabrial Priyev, on behalf of themselves and the settlement-certified class (plaintiffs-appellees), and Google, Inc. (defendant-appellee).

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INTRODUCTION

The petition proclaims that a square circuit conflict and important policy issues require this Court's immediate attention. Neither contention is true. The reality is more mundane. This case simply presents a commonplace dispute about the fairness of an arm's-length settlement, one that was overseen by a respected, neutral mediator and extensively scrutinized by the courts below.

Petitioners contend that, in the context of class action settlements, the Ninth Circuit's affirmance breaks with other circuits regarding the *cy pres* allocation of settlement benefits. But petitioners do not challenge the settlement's size or amount, do not argue monetary injury, and do not contest the award of attorneys' fees. And they identify no circuit split concerning the legal standards at issue. At bottom, petitioners challenge only the district court's factual findings that: (i) distributing the roughly $5.3 million net settlement fund to a class consisting of approximately 129 million people was not feasible, and (ii) that the *cy pres* recipients' use of funds was tethered to the alleged injury and interests of the class. On these factual questions, there is no circuit split.

Every circuit has approved the use of *cy pres* where direct distribution to class members is not feasible. The cases cited by petitioners are nothing more than distinguishable, fact-bound applications of well-established circuit law, and are consistent with the law applied by the Ninth Circuit in this case.

To create the appearance of a circuit split, petitioners advance the straw-man argument that the standard in the Ninth Circuit is that "it is not considered 'feasible' to provide any compensation to class members when it would be infeasible to compensate *all of them*." Pet. 17. The lower courts, however, did not announce or apply any such standard. Rather, like other circuits in cases cited by petitioners, the lower courts in this case found that the record supported a finding that the settlement fund was non-distributable and noted that the relatively small amount of the settlement fund equated to just 4 cents per class member before taking into account administration and distribution costs.

The underlying questions here are inherently case specific, requiring this Court to upset factual findings concerning the feasibility of direct distribution, the relationship between the *cy pres* remedies and the harm alleged, and the class benefit of the *cy pres* relief. And there is no cause to do so, because each of these findings was demonstrably correct.

Petitioners have not identified any disagreement among courts concerning the factors that should be considered when determining whether a *cy pres* provision is fair, reasonable, and adequate. The lower courts' fact-bound application of uniform standards does not warrant this Court's review.

STATEMENT OF THE CASE

This petition arises from the settlement of a consolidated class action between respondents in this Court. Plaintiffs-Respondents alleged that Defendant-Respondent Google, Inc. ("Google") improperly transmitted user search queries to third parties in order to enhance advertising revenue and profitability. Plaintiffs brought claims for breach of contract and violations of the Stored Communications Act ("SCA"), 18 U.S.C. § 2702(a), as well as claims under various California statutes and common laws. Pet. App. 3.[1] Plaintiffs sought statutory damages under the SCA and damages based on the value of the information misappropriated by Google.

The parties made several attempts to resolve the matter without success. SER 1:61.[2] On January 28, 2013—while Google's third motion to dismiss the consolidated complaint was under submission—the parties mediated the case before Randall Wulff, an experienced and well-respected mediator of class-action disputes. Pet. App. 71. After a full day of arm's-length negotiations, Mr. Wulff made a "mediator's proposal" for settlement based upon his review of the facts and applicable law. SER 1:62. All parties accepted this proposal and used it to form the material terms of the instant settlement agreement

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[1] "Pet. App." refers to the appendix to the instant petition for a writ of certiorari.

[2] "SER" refers to Plaintiff-Respondents' Supplemental Excerpts of Record filed with the Ninth Circuit. The SER are available via PACER for the Ninth Circuit at ECF 27-1, 27-2, and 27-3 (Case No. 15-15858).

("Agreement"), which was further negotiated for nearly two months before being fully executed on March 16, 2013. Pet. App. 69-111.

As part of the Agreement, Google agreed to make a total cash payment of $8,500,000 into a settlement fund, to be used for payment of settlement notice and administration expenses, *cy pres* distributions, any court-approved attorney fee or cost award to class counsel, and any court-approved incentive awards to the named Plaintiff-Respondents and class representatives. *Id.* None of the settlement funds would revert to Google under any circumstances.

In addition, Google agreed—for the first time—to disclose to users the ways in which it treats search queries entered in Google.com, so that users can make informed choices about whether and how to use Google search. *Id.* at 109-111. Google's obligation is permanent. *Id.* at 82. This relief is flatly ignored by petitioners, who misrepresent the settlement as containing "no alteration of defendant's allegedly injurious conduct." Pet. 1.[3]

The parties originally discussed more than twenty potential *cy pres* recipients. SER 2:385. As a result of the negotiations, the parties agreed to seven potential recipients, one of which (the MacArthur Foundation) later withdrew from consideration. SER 3:531.

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[3] Petitioners either mischaracterize or misunderstand plaintiff-respondents' claims below. The practice challenged here was not the practice of forward referring headers itself, but rather the failure to obtain user consent (or misleading consumers to believe that defendant would not forward referrer headers) before doing so.

The Settlement was designed to ensure that the *cy pres* recipients, each experienced in addressing privacy issues, could decide how to best spend the funds without influence from the parties. Google had no say whatsoever as to what any recipient would or could do with *cy pres* funds; its role in the *cy pres* process ended once the Agreement was executed. SER 2:383-85; 387-93.

In order to be considered for an award, each of the proposed *cy pres* recipients was required to demonstrate that it: (1) was independent and free from conflict; (2) had exemplary service records promoting public awareness and education, or support research, development, and initiatives related to protecting privacy on the Internet, with an emphasis on consumer-facing efforts; (3) would reach and target Internet users of all demographics across the country; (4) was willing to provide detailed proposals to the court and the class; and (5) was capable of using the funds to educate the class about risks attendant with disclosing personal information to Internet service providers, inform policy makers about the challenges associated with internet privacy and possible solutions, develop tools allowing consumers to understand and control the flow of their personal information to third parties, or develop tools to prevent third parties from exploiting consumer data. SER 1:63 n.1.

Far from distributing the money to *cy pres* recipients for "unspecified uses," as petitioners contend (Pet. 2), each potential *cy pres* recipient was required to and did submit a detailed grant-like proposal detailing exactly how the money would be

put to use.[4] Pet. App. 48, n.1. These proposals were publicly disclosed on a settlement website, along with the percentage of the $8.5 million (minus attorneys' fees and costs, any potential incentive awards, and administration costs) that each *cy pres* recipient would receive upon settlement approval.

The district court carefully reviewed these proposals at both preliminary and final approval. At the district court's request on preliminary approval, Plaintiff-Respondents submitted a supplemental declaration that provided further information about the selection process for *cy pres* recipients and what the recipients would do with proceeds, along with a revised proposed order and opt-out forms. SER 3:531. Seven months after the hearing, on March 26, 2014, the district court issued an order granting preliminary approval. Pet. App. 34.

The district court held a final fairness hearing on August 29, 2014. *Id.* It stated that it had "carefully reviewed" the "detailed" *cy pres* proposals (Pet. App. 48) and held the motions under submission for more than seven months before issuing its orders granting the motion for final approval and for attorneys' fees, costs, and incentive awards on March 31, 2015. Pet. App. 6.[5] The district court found that plaintiffs had made a sufficient showing that the cost of distributing the settlement fund to the class members would be prohibitive. Specifically, the district court found that:

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[4] The proposals are available in the SER 2:257-381.

[5] Although petitioners include argument about "clear sailing" attorney fee agreements (Pet. 2), the Agreement did not contain any clear sailing agreement.

> The settlement fund, while sizeable, is 'non-distributable.' Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Pet. App. 47. *See also id.* at 9.

The district court further found that "the *cy pres* distribution accounts for the nature of this suit, meets the objectives of the SCA, and furthers the interests of class members . . . Having carefully reviewed the proposals submitted by counsel, the court is satisfied that the proposed *cy pres* distribution 'bears a substantial nexus to the interests of the class members,' as required by the Ninth Circuit." Pet. App. 48-49.

Objector-petitioners timely filed a notice of appeal that ultimately led to the Ninth Circuit's affirmation of the district court's decisions on August 22, 2017.

REASONS FOR DENYING THE PETITION

The petition seeks review of a case-specific decision that applies settled and uniform law to the unique facts of a class-action settlement. Petitioners, who have identified no circuit conflict, object to the

district court's factual findings that: (1) the settlement fund was non-distributable, and (2) the *cy pres* recipients provided sufficiently detailed, line-item disclosures of how the money will be used to remediate the harms identified in the complaint. This Court should deny certiorari.

I. There Is No Circuit Conflict on the Legal Standard for when a *Cy Pres* Provision Is Fair, Reasonable, and Adequate.

Petitioners incorrectly argue that the Third, Fifth, Seventh, and Eighth Circuits apply a categorical rule that limit *cy pres* remedies to cases where direct distributions are "impossible," while the Ninth Circuit applies a legal standard permitting *cy pres* remedies whenever distribution to *all* class members is infeasible. Pet. 16-17. Petitioners misstate these legal standards. The reality is that in common-fund cases with a *cy pres* component, all circuits apply nearly identical factors to approval of *cy pres* remedies. Petitioners twist the uniform circuit law governing the approval of settlement with a *cy pres* component in order to create the appearance of a circuit conflict.

The Ninth Circuit recognized in this case that "*cy pres*–only settlements are considered the exception, not the rule." Pet. App. 8 (citing *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011)). The legal standard applied by the Ninth Circuit here was that a settlement fund is "non-distributable" where "the proof of individual claims would be burdensome or distribution of damages costly." *Id.*

Likewise, other circuit courts have recognized that *cy pres* distributions are permissible where direct distributions are infeasible or not economically viable:

- **First Circuit**: *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (recognizing that *cy pres* is permissible when "distribution of all funds to the class can be infeasible, for example, when class members cannot be identified, when the class changes constantly, or when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals").

- **Second Circuit**: *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) ("The Second Circuit has recognized that *cy pres* distributions may be appropriate in 'circumstances in which direct distribution to individual class members is not economically feasible . . . .') (quoting the American Law Institute's Principles of the Law of Aggregate Litigation § 3.08 (Draft) ("ALI Principles")).

- **Third Circuit**: *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 169–72 (3d Cir. 2013) (recognizing that *cy pres* distributions are appropriate where "amounts involved are too small to make individual distributions economically viable . . ." and "[i]t may also be economically or administratively infeasible to distribute funds to class

members if, for example, the cost of distributing individually to *all* class members exceeds the amount to be distributed") (emphasis added).

- **Fifth Circuit**: *Klier*, 658 F.3d at 475 (a *cy pres* distribution is permissible when it is not economically viable to make direct distributions to the class).

- **Seventh Circuit**: *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784, (7th Cir. 2004) (*cy pres* is intended to accommodate the "infeasibility of distributing the proceeds of the settlement."). *See also Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675-78 (7th Cir. 2013) (where direct distribution infeasible, a "foundation that receives $10,000 can use the money to do something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given $3.57 cannot").

- **Eighth Circuit**: *Marshall v. Nat'l Football League*, 787 F.3d 502, 521 (8th Cir. 2015) (recognizing the Eighth Circuit's approval of *cy pres* distributions where distributions are not sufficiently large enough to make individual distributions economically viable).

- **Tenth Circuit**: *Tennille v. W. Union Co.*, 809 F.3d 555, 560 (10th Cir. 2015) (recognizing that "[t]he *cy pres* doctrine allows a court to distribute unclaimed or

> non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries") (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011).

Similarly, the American Law Institute's Principles of Law of Aggregate Litigation, cited by petitioners (Pet. 25), specifically approve the use of an all-*cy pres*-settlement in class actions, with no direct payment to class members, "when distribution of the funds directly to class members is not feasible and the third party's interests approximate those of the class members." ALI Principles § 3.07 cmt. A (2010); *see also* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:17 (4th ed. 2012) ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.").

The ALI standard for determining feasibility of direct distribution is nearly identical to that applied by the Ninth Circuit here. "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members." ALI Principles § 3.07(a). *See also* comment (b) (stating that direct distributions to class members are not feasible "either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable.")

Petitioners' cases do not illustrate any conflict in the legal standard applied by the circuit courts. Rather, each of those cases applies the same legal standards to a different set of facts, which accounts for the differences in the ultimate outcomes of each of those cases.

The Seventh Circuit's opinion in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) neither conflicts with the Ninth Circuit's decision nor counsels (let alone compels) disapproval of the settlement under review here. On the contrary, the *Pearson* decision merely recognized, like all other circuits, that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the . . . class members." *Id.* at 784; *see Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (explaining that *cy pres* is permissible only when "'the proof of individual claims would be burdensome or the distribution of damages costly'") (quoting *Nachshin*, 663 F.3d at 1038). Moreover, the Seventh Circuit in *Pearson* did not hold that *cy pres* awards never benefit the class; it simply found that the specific award in that settlement did not. *Pearson*, 772 F.3d at 784.[6]

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[6] Petitioners also misconstrue the reasoning in *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004). Pet. 2, 18, 23. The "careful scrutiny" cited by the court there refers not to whether the settlement fund could be distributed to the class, but to the adequacy of the *size* of the settlement fund in the first instance—emphasizing "the district judge's duty in a class action settlement situation to estimate the litigation value of the claims of the class and determine whether the settlement is a reasonable approximation of that value." *Id.* at 786. Here, petitioners do not contest the size of the settlement fund. Likewise, *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997), is inapposite. Pet. 18. In *Mace*, the district court denied

Nor is there any inconsistency between the Ninth Circuit Court's precedents and the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015). The Eighth Circuit noted that, like in every other circuit, a finding that a fund is non-distributable must be based on whether "amounts involved are too small to make individual distributions economically viable." *Id.* at 1065. On the facts before it, the Eighth Circuit found that the district court improperly ordered a *cy pres* distribution of residual funds because a second direct distribution of $2 million could be made to class members who had already received and cashed settlement checks, and that the further direct distribution would cost only $27,000. *Id.* at 1064.

The Eighth Circuit also expressly "agree[d] with the Ninth Circuit" that *cy pres* awards are permissible so long as they provide an "indirect class benefit" by going to "uses consistent with the nature of the underlying action." *Id.* at 1066-67 (citing *Nachshin*, 663 F.3d at 1040; other citations omitted). The court rejected the proposed *cy pres* award in *BankAmerica* because the single recipient—a Missouri legal-services organization—had an insufficient nexus to

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class certification on the grounds that the FDCPA claims brought by plaintiffs could not be certified on state-wide basis (which would have resulting in a projected $12 per class member), but instead required a nation-wide class (which would have resulted in a projected recovery of 20 cents per class member). The Seventh Circuit reversed, finding that a state-wide class (with its projected $12 per class member recovery) could be certified. The Seventh Circuit thus concluded that, unlike here, the projected $12 recovery "though small, would not be either difficult to assign or difficult to distribute." *Id.* at 345.

the securities fraud claims asserted by the nationwide class. *See In re BankAmerica*, 775 F.3d at 1067. No similar objections have been or could be raised against the targeted projects proposed by the *cy pres* recipients here, whose activities have nationwide scope and effects.

The Fifth Circuit's decision in *Klier* involved the unusual situation in which a district court *sua sponte* ordered *cy pres* distribution of unclaimed settlement funds to the detriment of one of the subclasses. *See Klier*, 658 F.3d at 476-77. In contrast to the settlement here, the settlement agreement in that case explicitly directed that any leftover funds in a subclass fund "'shall be distributed pro rata to all Claimants in that subclass.'" *Id.* at 476. That is, *Klier* involved a district court's attempt to override a settlement rather than approve or enforce it; "the district court's decision to distribute the unused funds via *cy pres* [found] no support in the text of the settlement documents." *Id.* at 476-77. In rejecting that reallocation of funds contrary to the agreement of the parties, the Fifth Circuit recognized the limitation of its holding and made clear that its decision did not "implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution." *Id.* at 478 n.29 (citing, inter alia, *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1304, 1307 (9th Cir. 1990)). It is that "line of authority" that governs review of the settlement at issue here; *Klier* is irrelevant.[7]

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[7] Notably, the *Klier* court found that it was not feasible to distribute $830,000 in leftover funds to 12,657 class members—or $65 per class member. *Id.* at 472-76.

The decisions below also do not conflict with the Third Circuit's *Baby Products* decision, which cited the Ninth Circuit's decision in *Lane* with approval in "join[ing] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component." *Baby Prods.*, 708 F.3d at 172. *Baby Products* further explained that, although "*cy pres* distributions are most appropriate where further individual distributions [to class members] are economically infeasible," it declined to "hold that *cy pres* distributions are only appropriate in this context." *Id.* at 173. Instead, *cy pres* relief is permissible when it is "fair, reasonable, and adequate" under "the same framework developed for assessing other aspects of class action settlements." *Id.* at 174. That is, the Third Circuit rejected the inflexible rule petitioners press here, in a way that raises no questions about the order under review here.[8]

Petitioners' reliance on the Second Circuit's decision in *Masters* is also misplaced. In that case, the feasibility of direct distribution was not at issue. Rather, the district court ordered a *cy pres* distribution rather than further distributions to the class because it believed that the class had already been fully compensated, and further direct distributions would have resulted in an impermissible windfall. The Second Circuit expressed

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[8] In *Baby Prods.*, the court vacated certification of the antitrust settlement class because the district court "was apparently unaware of the amount of the fund that would be distributed to *cy pres* beneficiaries rather than being distributed directly to the class." 708 F.3d at 170.

concern that the district court may not have appreciated the "breadth of its discretion" under the specific settlement agreement, which empowered the court to "allocate [additional] funds to the members of the class as treble damages" rather than to *cy pres*. *Masters*, 473 F.3d at 435.

Each of the cases cited by petitioners applies the same general standard for when the use of *cy pres* is appropriate. These cases are simply fact-bound applications of settled circuit law, evaluating class-action settlements on their relative merits in the context of the particular litigation at hand. Each case turned on the court's fact-specific determination of whether, under the circumstances presented, resort to *cy pres* was fair, reasonable, and adequate. At bottom, these cases provide no support for petitioners' claim that there is any circuit split on the question of when a *cy pres* provision is fair, reasonable, and adequate. Petitioners have attempted to create a circuit split where none exists.[9]

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[9] The *amicus curiae* briefs present the additional argument, not contained in the petition or advanced below, that *cy pres* awards "implicate[] . . . First Amendment rights of class members because such settlement compel class members to subsidize speech." Brief of Center for Individual Rights, p. 1. Because this argument is not raised in the petition, and was not advanced in the court of appeals, this Court should not consider it on the petition for writ of certiorari. SUP CT. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 114, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

There is no basis to find an abuse of discretion in the lower courts' findings that the settlement fund here was non-distributable. Petitioners do not present any basis to undermine the district court's conclusion that, in light of the enormous size of the class and the comparatively small value of the settlement fund, that fund is "nondistributable" directly to class members. Even if there were such a basis, this Court does not engage in error correction. SUP CT. R. 10.

Instead, petitioners contend that this Court should hold for the first time that, as a matter of law, a settlement must offer a mechanism to provide a windfall to a minuscule portion of class members—chosen either by lottery or by a claims process that petitioners themselves acknowledge is likely to have a very small claims rate—rather than providing an indirect benefit to the class as a whole through the *cy pres* mechanism.[10] Yet, petitioners do not explain why the interests of the class as a whole are better served by giving a windfall to a very few and nothing to the rest. Certainly nothing in any circuit precedent supports—much less requires—a rigid requirement favoring small payments to a tiny fraction of class

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[10] Petitioners present no evidence of any circuit conflict concerning the Ninth Circuit's statement below that its "review of the district court's settlement approval is not predicated simply on whether there may be 'possible' alternatives," or "the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them." Pet. 14. Likewise, no circuit has ever held that if "any distribution to class members was infeasible, then that should call into question class certification, because it would not be, as Rule 23(b)(3) requires, superior to other available methods for fairly and efficiently adjudicating the controversy." Pet. 11.

members over payments to fund research, analysis, education, and advocacy on Internet privacy issues that, as the lower courts found here, will benefit a much greater proportion (and quite possibly all) of the class.[11]

II. This Case Does Not Provide a Proper Vehicle to Consider the Inclusion of *Cy Pres* Provisions in Settlement Agreements.

A. The Petition Presents a Fact-Bound Question of No Significance Beyond the Settlement of this Litigation.

This Court does not engage in correcting misapplication of law by lower courts, or in error correction, much less wade into the morass of the terms of a settlement agreement. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (declining to review concurrent findings of fact by two courts below absent "a very obvious and exceptional showing of error"); SUP. CT. R. 10.

This case presents nothing more than a dispute about the relative merits of the benefits of this class-action settlement. The settlement benefits were the subject of thorough factual findings by two courts below concerning its value to the class. Reversing approval of the Settlement would necessarily require

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[11] Petitioners do not mount a serious challenge to the lower courts' findings that the detailed *cy pres* proposals demonstrate a proper nexus between the *cy pres* recipient(s) and the class, as is uniformly required by every circuit.

this Court to substitute its own judgment about the facts for that of the courts below.

Petitioners' legal arguments are wholly predicated on facts directly contrary to those found by the courts below. Thus, prior to even reaching the questions petitioners ask the Court to review, this Court would have to comb the record and reverse two lower courts' (correct) findings of fact, including the factual findings that the settlement fund was non-distributable[12] and that the *cy pres* recipients had a substantial nexus to the interests of the class members.[13]

B. The Settlement Does Not Allow the Court to Address the Concerns Identified by Chief Justice Roberts.

In *Marek v. Lane*, 134 S. Ct. 8 (2013), Chief Justice Roberts agreed with the Court's decision to deny the petition for certiorari under facts and circumstances somewhat similar to the instant matter. Chief Justice Roberts also identified several concerns the Court may want to address when the right vehicle comes before it. This case is not that vehicle. Just as in *Marek*, "[petitioners'] challenge is focused on the particular features of the specific *cy pres* settlement at issue[,]" and thus does "not afford[] the Court an

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[12] The Ninth Circuit panel was unanimous in finding that the settlement fund was non-distributable. Pet. App. 8-11.

[13] Moreover, to the extent petitioners now contend that the requisite nexus is lacking, that argument is waived because it was not raised below. Pet. App. 12 ("Objectors do not dispute that the nexus requirement is satisfied here.")

opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation[.]" *Id.* at 9.

The first concern raised by Chief Justice Roberts is "when, if ever, such relief should be considered[.]" *Id.* If *Marek* was not the right case for the Court to consider this concern, then the instant matter is surely also not the right case. In *Marek*, the net settlement fund totaled $6.5 million and there were 3.6 million class members—approximately $1.81 per person. *See* Pet. App. 8-9. In the instant case, the net settlement fund totals $5.3 million and there are at least 129 million class members—approximately $0.04 per person before taking administration and distribution costs into account. *Id.* While no objector contested the size of the Settlement fund, the instant Settlement was even less feasibly distributable than the fund in *Marek*, making this Settlement less attractive as a vehicle to consider when *cy pres* is appropriate.

The second concern is "how to assess its fairness as a general matter[.]" *Marek*, 134 S. Ct. at 9. For the same reasons described above, this case does not present the opportunity Chief Justice Roberts seeks to evaluate *cy pres* relief. Here, the Ninth Circuit followed its own undisturbed precedent—which, as argued above, is consistent with precedent in other circuits—in affirming the district court's finding that the Settlement is "fair, reasonable, and adequate."

Third, this case does not concern "whether new entities may be established as part of such relief." *Id.* None of the *cy pres* recipients in the Settlement is a

new entity. In fact, the Ninth Circuit affirmed the district court's findings that the recipients are "established," "independent" organizations. *Id.*

Fourth, petitioners do not seriously object to the method by which the recipients were selected, so Chief Justice Roberts's concern regarding "how existing entities should be selected" is not at issue in this matter. *Id.*

Fifth, for the same reasons as described immediately above, this case does not present an optimal backdrop to address Chief Justice Roberts's concern regarding "what the respective roles of the judge and parties are in shaping a *cy pres* remedy[.]" *Id.*

Sixth and finally, Ninth Circuit precedent requires "*cy pres* awards to meet a 'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members." Pet. App. 12 (quoting *Naschin*, 663 F.3d at 1039). The lower courts, on a detailed and voluminous factual record, found that the *cy pres* recipients were committed to using the funds in a manner closely corresponding to the interests of the class.

The Ninth Circuit noted that "the *cy pres* recipients were six organizations that have pledged to use the settlement funds to promote the protection of Internet privacy." Pet. App. 7. The Ninth Circuit went on to state that:

> "[t]he district court found that the six *cy pres* recipients are 'established

> organizations,' that they were selected because they are 'independent,' have a nationwide reach and 'a record of promoting privacy protection on the Internet,' and 'are capable of using the funds to educate the class about online privacy risks.'"

Pet. App. 12.

"Accordingly, the district court appropriately found that the *cy pres* distribution addressed the objectives of the Stored Communications Act and furthered the interests of the class members." Pet. App. 12-13.

Moreover, contrary to the assertions of petitioners, the funds were not to be used by the recipients for "unspecified" purposes or uses. Pet. 1. Rather, each *cy pres* recipient was required to submit proposals detailing how the *cy pres* funds would be used. *See, e.g.*, Pet. App. 47-48. The grant-like proposals were designed to address the alleged harm in this lawsuit and included detailed budgeting associated with each project. The funding covers projects aimed at:

- improving user privacy online, by: (1) furthering researchers' understanding of user privacy behaviors and online threats to users' privacy; (2) improving user-facing interfaces and technologies to increase users' understanding and control of their privacy; and (3) developing computational mechanisms to help ensure the systems and organizations adhere to privacy regulations

or policies (Carnegie Mellon) (SER 1:56; 2:284-97);

- a research project into third-party data flows to uncover consumer harms stemming from search queries typed into online search boxes; and (2) a national consumer education project focused on bringing online privacy education to all consumers, with a particular focus on vulnerable consumers who often miss online privacy educational campaigns due to financial, linguistic, education, medical, or other barriers (World Privacy Forum) (SER 1:56-57; 2:348-81);

- privacy preparedness, which will combine academic research, public education, and outreach to safeguard individuals' online privacy and to help users implement privacy protections when they interact with the Internet (Chicago-Kent College of Law Center for Information, Society, and Policy) (SER 1:57; 2:298-314);

- original research to advance best practices for mobile phone privacy; (2) controlled trials to improve existing Privacy Enhancing Technologies ("PETs") and develop new ones; (3) analysis of proposed privacy legislation; and (4) an educational speaker and public outreach series to educate, inform, and train users about online privacy risks and available tools to mitigate those risks (Stanford Law School

Center for Internet and Society) (SER 1:57; 2:315-47);

- develop concrete proposals for safeguarding Internet privacy more effectively via legal and policy reform, company action, technological innovation, targeted education, and user outreach (Berkman Center for Internet & Society at Harvard University) (SER 1:58; 2:263-83);

- develop a national initiative to educate and inform 1,000,000 individuals over a three-year period on how to protect their online privacy and proactively avoid the harmful impact of Internet fraud and identity theft (AARP Foundation) (SER 1:58; 2:257-62).

Petitioners contend that approval of the *cy pres* recipients was in error, but never once address these detailed proposals. The reason for this is clear: the recipients' proposals all require the funds to be spent on Internet privacy initiatives closely related to the harms alleged by the class. Thus, the concern regarding "how closely the goals of any enlisted organization must correspond to the interests of the class" simply cannot be addressed in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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